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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 30

DEMETRIUS MCGEE,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 5, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 30, People v.  
2 McGee.

3 Go ahead, counsel.

4 MS. RUSSO-MCLAUGHLIN: Karen Russo-  
5 McLaughlin, appearing on behalf of Demetrius McGee.  
6 I would ask for two minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
8 counsel.

9 MS. RUSSO-MCLAUGHLIN: The appellant  
10 contends on appeal that the proof was woefully short  
11 of what the legal standard requires. The People  
12 simply did not sustain their burden on three separate  
13 levels. First of all - - - and I would address the  
14 attempted murder charge first. There was no proof of  
15 community of purpose between the appellant and his  
16 co-defendant.

17 JUDGE READ: Well, what would you - - -  
18 what would you need? I mean, there's - - - this man  
19 was driving the car, right?

20 MS. RUSSO-MCLAUGHLIN: That's correct. But  
21 I think the court needs to review that - - - to view  
22 this as two separate incidences. There was an  
23 incident for which they were charged with reckless  
24 endangerment and I think that that is a separate  
25 incident from the attempted murder.

1                   When viewing the attempted murder, I would  
2 ask the court to look at your previous decision in  
3 People v. Cabassa, that's very similar to this case,  
4 but distinguishable.

5                   JUDGE READ: What about the idea that he  
6 positioned the car?

7                   MS. RUSSO-MCLAUGHLIN: Excuse me?

8                   JUDGE READ: What about the idea that he  
9 positioned the car in such a way that the shot could  
10 be taken?

11                   MS. RUSSO-MCLAUGHLIN: Well, I think the  
12 testimony showed - - - and the record shows - - -  
13 that although he may have moved into another lane,  
14 that there was not really the clear - - - a clear  
15 shot that could be made by the co-defendant. That  
16 had there been an attempt to commit a murder, there  
17 would have been - - -

18                   CHIEF JUDGE LIPPMAN: There was damage to  
19 the car, though, right?

20                   MS. RUSSO-MCLAUGHLIN: I think that that  
21 was very equivocal. Officer Clark was not even sure  
22 that the - - - that the two shots hit his car. The -  
23 - -

24                   JUDGE PIGOTT: Well, what were they doing?

25                   MS. RUSSO-MCLAUGHLIN: They were trying to

1 evade capture. I think that that's - - -

2 JUDGE PIGOTT: That's all?

3 MS. RUSSO-MCLAUGHLIN: I - - - yes, I  
4 definitely believe that.

5 JUDGE SMITH: Well, why - - - well, they're  
6 trying to evade capture by moving over into the left  
7 hand lane and firing at the car behind them.

8 MS. RUSSO-MCLAUGHLIN: Well, that's  
9 correct. And I don't - - - I don't - - - if this  
10 court wants to decide that anytime a shot is fired in  
11 the direction of a police officer, that's an attempt  
12 to murder, then the court can decide that - - -

13 JUDGE SMITH: And maybe not anytime - - -  
14 but it doesn't - - -

15 MS. RUSSO-MCLAUGHLIN: - - - but I'm not  
16 sure that - - -

17 JUDGE SMITH: It doesn't - - - it is one  
18 obvious explanation. I mean, if you're a police  
19 officer and you see shots coming at you, you might be  
20 excused for think - - - be thinking that someone's  
21 trying to kill you.

22 MS. RUSSO-MCLAUGHLIN: However, intent is  
23 circumstantial here. And then the court has to  
24 consider any other reasonable - - -

25 JUDGE SMITH: But you make this - - -

1 JUDGE GRAFFEO: Well, they weren't - - -  
2 they weren't shooting in the air to scare the police.  
3 I mean, wasn't - - - wasn't there evidence that there  
4 was a bullet hole or something on the - - -

5 MS. RUSSO-MCLAUGHLIN: No, there was no - -  
6 -

7 JUDGE GRAFFEO: - - - on the same side of  
8 the car that the officer - - -

9 MS. RUSSO-MCLAUGHLIN: No.

10 JUDGE GRAFFEO: - - - was seated?

11 MS. RUSSO-MCLAUGHLIN: No, there was no  
12 bullet hole, and the People's - - -

13 JUDGE GRAFFEO: There was damage to the  
14 passenger door - - -

15 MS. RUSSO-MCLAUGHLIN: That was equivocal.

16 JUDGE GRAFFEO: - - - behind the police  
17 officer.

18 MS. RUSSO-MCLAUGHLIN: That was equivocal.  
19 If you review the record carefully, the officer who -  
20 - -

21 JUDGE GRAFFEO: Well, unless they actually  
22 shot the police officer, there'd be no intent to  
23 kill.

24 MS. RUSSO-MCLAUGHLIN: I think,  
25 overwhelmingly, the cases that have found there was

1 an attempt to commit a murder, there has been actual,  
2 physical contact between a perpetrator and a victim.

3 This is - - -

4 JUDGE SMITH: But you're not - - - you're  
5 not saying that you can't be convicted of an  
6 attempted murder for shooting and missing?

7 MS. RUSSO-MCLAUGHLIN: No, no. But I think  
8 - - - I think if you look at the facts and we compare  
9 this - - -

10 JUDGE SMITH: Would you - - - would you be  
11 making the same argument if your client had actually  
12 fired the gun?

13 MS. RUSSO-MCLAUGHLIN: Actually, I don't  
14 think there's enough to convict even the shooter in  
15 this particular case. I don't believe that there is,  
16 Judge. Had there - - - had there been a definite  
17 attempt to commit murder, why only two shots? Why  
18 not three or four? He's just a bad shot? I don't  
19 think so, especially in light of the fact that later,  
20 when the chase continued, there are two officers on  
21 the side of road with weapons pointed at the car as  
22 it went by, and there was no attempt to shoot these  
23 officers.

24 JUDGE READ: So what would - - - what would  
25 - - -

1 MS. RUSSO-MCLAUGHLIN: So - - -

2 JUDGE READ: What would have to have been  
3 shown to elevate this to - - - to make it sufficient  
4 evidence for attempted murder in your view?

5 MS. RUSSO-MCLAUGHLIN: Dangerously near.  
6 The standard is dangerously near completion of the  
7 crime. The bullets - - -

8 JUDGE READ: So - - -

9 MS. RUSSO-MCLAUGHLIN: Whether the bullets  
10 even hit the vehicle, and it was the back of the  
11 vehicle - - -

12 JUDGE READ: So if the bullets had - - - if  
13 there were clear - - - and you say there isn't - - -  
14 but if there were clear evidence that there was a  
15 bullet in the vehicle, that would be enough?

16 MS. RUSSO-MCLAUGHLIN: I think you would  
17 have to look where in approx - - - in approximation  
18 to the intended victim. I think - - -

19 JUDGE PIGOTT: We're discussing - - -

20 MS. RUSSO-MCLAUGHLIN: - - - it might be  
21 closer - - -

22 JUDGE PIGOTT: We're discussing  
23 sufficiency, right?

24 JUDGE READ: Sufficiency.

25 MS. RUSSO-MCLAUGHLIN: Yes. And the mens

1           rea - - - where was the intent?

2                   JUDGE GRAFFEO: Well, can I ask you a  
3           general question? If there was not any commonality  
4           of interest here, why didn't your client stop driving  
5           the car at some point?

6                   MS. RUSSO-MCLAUGHLIN: Well, I'm - - -

7                   JUDGE GRAFFEO: I mean, there were several  
8           different things that happened here.

9                   MS. RUSSO-MCLAUGHLIN: Well, he was trying  
10          to evade capture. Had he stopped - - - had he  
11          stopped, he would have been captured. I think that  
12          that's pretty evident. And I'm - - - I guess he did  
13          not want to accept any responsibility for those  
14          events, if he could get away with it, but that  
15          doesn't mean that he intended to commit a murder of a  
16          police officer.

17                   JUDGE SMITH: How about the reckless  
18          endangerment? What's - - - what's your argument on  
19          that one?

20                   MS. RUSSO-MCLAUGHLIN: Well, with respect  
21          to the community of purpose - - - or community of  
22          interest, the Appellate Division found that the  
23          testimony of the jailhouse informant provided that  
24          community of purpose. And I don't think that that  
25          should apply to the appellant, because the jailhouse

1 informant didn't know the name of the driver of this  
2 vehicle.

3 All he stated was that his friend, Mychal  
4 Carr, who's - - - who had informed, it was his  
5 birthday. And somebody - - - somebody came and  
6 picked him up and was the driver of a vehicle. We  
7 don't know what happened between the time when the  
8 driver was picked up and these events occurred. I  
9 think it was - - - it was too remote; it did not  
10 provide the - - - a sufficient community of purpose  
11 with respect to the reckless endangerment.

12 JUDGE SMITH: As I understood, the reckless  
13 endangerment is - - - charge is based on the first  
14 part of the incident, before the police - - -

15 MS. RUSSO-MCLAUGHLIN: Right.

16 JUDGE SMITH: - - - arrived, and the  
17 shooting - - -

18 MS. RUSSO-MCLAUGHLIN: That's correct.

19 JUDGE SMITH: - - - and endangering the  
20 civilians. What - - - your client - - - is there any  
21 evidence that your client fired any of those shots?

22 MS. RUSSO-MCLAUGHLIN: No, there isn't any  
23 evidence that he fired.

24 JUDGE SMITH: He was driving, but he was -  
25 - - he said, he was driving while somebody else was

1           doing the shooting.

2                       MS. RUSSO-MCLAUGHLIN: He - - - the only  
3 evidence is that he stated that he was the driver - -  
4 - I was only the driver - - - which tends to - - -  
5 tends to support his argument that he didn't have any  
6 intent here.

7                       JUDGE SMITH: Do you need - - - I just - -  
8 - this question just occurred to me. Do you need  
9 intent for reckless endangerment? Isn't it supposed  
10 to - - - isn't that's why it's called "reckless  
11 endangerment"? You only need recklessness.

12                      MS. RUSSO-MCLAUGHLIN: Well, I - - -  
13 specifically, I was referring to the first charge - -  
14 -

15                      JUDGE SMITH: Yeah. I mean, I'm - - - I  
16 mean, I'm just thinking out loud, but how can you be  
17 an accomplice to a non-intentional crime?

18                      MS. RUSSO-MCLAUGHLIN: Well, under these  
19 circumstances, I think that many of these events  
20 unfolded without his - - - any purpose - - -

21                      JUDGE READ: Well, he drove down the street  
22 twice before the initial shooting. Is that right?

23                      MS. RUSSO-MCLAUGHLIN: That's my  
24 understanding, yes. He drove down the street twice,  
25 and there was - - - there was some equivocal evidence

1 about who, exactly, fired shots. There was evidence  
2 that there were two or perhaps three individuals in  
3 the vehicle. So the proof was far short of beyond a  
4 reasonable doubt.

5 I would ask the court to look specifically  
6 as - - - at my - - - the other issue, whether there  
7 was effective assistance of counsel. I'm very  
8 troubled by the fact that defense counsel didn't ask  
9 for severance. Clearly, the appellant was seriously  
10 hurt by counsel's failure to seek severance. If we  
11 look at the Appellate Division's decision there, the  
12 court stated that they found community of purpose - -  
13 -

14 JUDGE SMITH: Isn't there some risk when  
15 you ask for severance that if you're not the guy who  
16 goes first, they convict - - - they convict number  
17 one, and he's all - - - and you find him testifying  
18 against you?

19 MS. RUSSO-MCLAUGHLIN: Certainly that would  
20 be a consideration, but it went far beyond that.  
21 Counsel never objected to the late receipt of the  
22 Rosario material. The Rosario material was - - - had  
23 to do with the jailhouse informant. There was no  
24 objection to the jailhouse informant's testimony at  
25 the Cardona hearing. There was no objection during

1 the trial. It was that counsel didn't - - - paid no  
2 attention at all to this - - - all of this very  
3 damaging testimony regarding the community of  
4 interest in this case.

5 Also, counsel never asked for the lesser  
6 included offense. As Cabassa clearly - - - I don't  
7 believe he - - - counsel even read Cabassa, because  
8 had he done that, he would have asked for the lesser  
9 included offense of assault second. Counsel never  
10 challenged whether there was sufficient evidence to  
11 sustain the proof for attempt.

12 In all, it was wholly ineffective. And  
13 there need only be one serious error, and that  
14 serious error was the failure to seek severance in  
15 this case.

16 JUDGE PIGOTT: It wouldn't automatically be  
17 granted, though, right? I mean - - -

18 MS. RUSSO-MCLAUGHLIN: Pardon me?

19 JUDGE PIGOTT: You could move for a  
20 severance, and it can be denied.

21 MS. RUSSO-MCLAUGHLIN: Well, not  
22 necessarily, but I think a case could be made under  
23 these facts, especially when you have a jailhouse  
24 informant that is - - - even if he had asked for it  
25 later, when he knew this jailhouse informant was

1 going to - - - going to be testifying in a damaging  
2 way towards his client, he could have sought  
3 severance.

4 JUDGE SMITH: Would he have got a  
5 severance?

6 MS. RUSSO-MCLAUGHLIN: Possibly. I think  
7 he could have - - - because it was so damaging.  
8 Without - - - without the testimony of the jailhouse  
9 informant, there was virtually no proof at all of a  
10 community of purpose, specifically with the attempt  
11 to commit a murder, other than some remote inference  
12 of intent, so it certainly would have served his  
13 purposes to have severed the trial here.

14 CHIEF JUDGE LIPPMAN: Okay, counsel,  
15 anything else?

16 MS. RUSSO-MCLAUGHLIN: Are there any other  
17 questions?

18 CHIEF JUDGE LIPPMAN: No, anything you  
19 have? Thank you.

20 Counsel?

21 MR. HILLERY: Good afternoon, and may it  
22 please the court, Michael Hillery on behalf of the  
23 People of the State of the New York.

24 With respect to legal sufficiency, this  
25 court's standard, as set forth in People v. Acosta,

1 is that the reviewing court must view the facts in a  
2 light most favorable to the prosecution. And it need  
3 only see a valid line of reasoning or permissible  
4 inferences from which a rational jury could have  
5 found the elements proved beyond a reasonable doubt.

6 I would suggest that a rational jury  
7 certainly could have found in this case that  
8 defendant shared the intent of co-defendant shooter.  
9 There was a punishable attempt demonstrated by the  
10 People in that the vehicle was moved into the lane of  
11 oncoming traffic during a high-speed chase, and at  
12 that moment, when a shot by co-defendant was most  
13 propitious, it was made upon the pursuing police  
14 officer - - -

15 CHIEF JUDGE LIPPMAN: And what about if  
16 he's just driving? Where's the common scheme? Say,  
17 he really is just driving. And once he saw what was  
18 going on, he tried to get a - - - you know, get out  
19 of that line where shots could be fired.

20 MR. HILLERY: Absolutely, Judge. But there  
21 was more than that. It was more than just driving.  
22 We have it every moment of this case from the  
23 inception - - - from the moment that this vehicle is  
24 taxiing up Cambridge Avenue and co-defendant is  
25 shooting at houses and cars, we have a harmony of

1           conduct, a synergy of conduct. Nothing the defendant  
2           driver did can be said to have thwarted or  
3           counteracted what co-defendant did.

4                       And at the point of evasion, I would  
5           suggest that evasion is not mutually exclusive with  
6           intent to kill. And in fact, the best motive for  
7           this shooting was to evade the pursuing police  
8           officer. And defendant, by his - - -

9                       CHIEF JUDGE LIPPMAN: So you're saying when  
10          he got back into the other lane, he was just trying  
11          to avoid capture?

12                      MR. HILLERY: No, Your Honor, I'm not  
13          saying that he was only trying to avoid capture,  
14          although even if he was, that was still consistent  
15          with the purposes of the shooter. The best way that  
16          he could have - - -

17                      JUDGE SMITH: Well, there's not much doubt  
18          they were trying to avoid capture, is there?

19                      MR. HILLERY: Absolutely, Your Honor. They  
20          were.

21                      JUDGE SMITH: What about - - - what about  
22          the reckless endangerment? How can you be an  
23          accomplice to reckless endangerment?

24                      MR. HILLERY: That's a good question, Your  
25          Honor. I don't know. Perhaps that's a legal fiction

1 in this case. I would say, however, that there is no  
2 question that the facts and circumstances here  
3 evinced on the part of defendant driver a depraved  
4 indifference to human life. He was rightly convicted  
5 - - -

6 JUDGE SMITH: Well, you mean - - - you mean  
7 because he drove recklessly or because - - - because  
8 occupants of his car were shooting wildly?

9 MR. HILLERY: Both, Your Honor. He both  
10 enabled and facilitated the shooting on - - -

11 JUDGE SMITH: Well, which one was his  
12 convicted of?

13 MR. HILLERY: Well, he was driving at a  
14 speed - - - at speeds upwards ninety miles an hour to  
15 a hundred miles an hour in urban areas when police  
16 were - - -

17 JUDGE SMITH: No, no, but I'm asking a more  
18 specific question. I just don't know the record,  
19 maybe, as well as I should, but what was the jury  
20 told they had to find to convict him of reckless  
21 endangerment? Was it - - - did they - - - could they  
22 - - - were they allowed to convict him because of the  
23 way he drove or was it the shooting?

24 MR. HILLERY: Judge, I believe it was with  
25 respect to - - - it was the totality of the facts and

1           circumstances. But I believe that the driving itself  
2           was sufficient to make that charge. I mean, the  
3           police are driving at high speeds through urban areas  
4           pursuing this individual. He reaches ninety miles an  
5           hour, a hundred miles an hour even, swerves into the  
6           lane of oncoming traffic. At that point, co-  
7           defendant makes his shot, about two shots, possibly  
8           two shots - - - possibly three shots, according to  
9           the record - - - upon the pursuing police vehicle.

10                       There was certainly enough there to justify  
11           the jury's verdict. It was certainly rational.  
12           That's all the verdict has to be, and I would  
13           suggest, Your Honors, that it's not enough that  
14           another verdict, even an opposite verdict, would have  
15           been rational. This verdict here has to be  
16           demonstrably irrational, and it is not.

17                       We have that maneuver; we have the high  
18           speed. We have nothing - - - no indication in this  
19           record that defendant did anything to counteract what  
20           was happening, to stop the car. So there was more  
21           than enough for a jury here to convict.

22                       CHIEF JUDGE LIPPMAN: Okay, thanks,  
23           counsel.

24                       MR. HILLERY: Thank you.

25                       CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

1 MS. RUSSO-MCLAUGHLIN: I would just like to  
2 clarify one point. I believe counsel was suggesting  
3 that the reckless endangerment went to the manner of  
4 driving at high speeds and driving around city - - -  
5 city neighborhoods. I believe the reckless  
6 endangerment referred to when the car was driven  
7 around the block two times and they were - - - there  
8 were shots. There was testimony that there were  
9 shots fired at the houses. So the reckless  
10 endangerment - - -

11 JUDGE SMITH: Before the police were on the  
12 scene.

13 MS. RUSSO-MCLAUGHLIN: - - - went to the  
14 testimony of Cathryn Barlow. The reckless  
15 endangerment did not involve the - - - there are two  
16 separate incidences - - - did not involve the  
17 incident of attempted - - - or the charge of  
18 attempted murder. Just to clarify that.

19 And once again, to state that if this court  
20 follows the reasoning of People v. Cabassa, that the  
21 proof here is - - - certainly falls short. In  
22 Cabassa, there were shots - - - there were shots made  
23 by the two defendants as they drove. The shots were  
24 made at police officers. But then there was a second  
25 incident that really showed the intent. They then

1           drove through a police roadblock, and they continued  
2           to shoot at police.

3                       And here, very different.  When they ran  
4           across - - - or when they came upon the police a  
5           second time, standing in the street, there were no  
6           shots.  So, that goes to - - - that goes to show that  
7           this was an evasive - - - this was, probably, they  
8           were acting - - - this was a panic reaction to the  
9           situation of trying to evade being captured.

10                      CHIEF JUDGE LIPPMAN:  Okay, counsel.

11                      MS. RUSSO-MCLAUGHLIN:  Thank you.

12                      CHIEF JUDGE LIPPMAN:  Thanks; appreciate  
13           it.

14                      (Court is adjourned)

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I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Demetrius McGee, No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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